LIM HOCK LAI

v.

HWA KWONG DEVELOPMENT SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[SUIT NO: 22-202-99-I]
2 FEBRUARY 2001

LAND LAW: *Housing developers - Damages for late delivery - Purchaser assigned rights and interests in purchased property to bank for housing loan - Whether purchaser could bring action against developer in view of assignment*

CONTRACT: *Assignment - Sale and purchase of property - Assignment of purchaser's rights and interests in property to bank for housing loan - Whether assignment by way of charge only - Whether purchaser could bring action against housing developer for late delivery*

This was the defendant housing developer's appeal against the decision of the Deputy Registrar. The Deputy Registrar decided that the plaintiff had the *locus standi* to commence this action against the defendant for damages for late delivery of a house that the plaintiff had purchased from the defendant. The defendant contended that the plaintiff had no *locus standi* because he had assigned all his rights, title and interests in the house concerned to a local bank in return for a housing loan.

Held:

[1] The documents employed in the assignment with the bank was by way of a charge and was not an absolute assignment. Furthermore, such an assignment has been held to be of equitable mortgage or charge in *Chuah Eng Khong v. Malayan Banking Berhad*. Therefore, it was impossible upon a consideration of the terms of the documents employed in the assignment to conclude that the assignment was not by way of a charge.

[Appeal dismissed with costs.]

Case(s) referred to:

Chuah Eng Khong v. Malayan Banking Berhad [1999] 2 CLJ 917 ***(refd)***

Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor [1995] 2 CLJ 11 ***(foll)***

Loh Hoon Loi & Ors v. Viewpoint Properties (Sabah) Sdn Bhd [1995] 4 MLJ 804 ***(foll)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 33 r. 5

For the plaintiff - RJ Noel; M/s RJ Noel
For the defendant - SY Chan; M/s Ee & Lim

Reported by Suhainah Wahiduddin

JUDGMENT

Ian HC Chin J:

This is an appeal against the decision of the deputy registrar handed down on 31 October 2000 which went against the defendant Hwa Kwang Development Sdn Bhd. The deputy registrar had decided on an issue under O. 33 r. 5 of the RHC 1980 that Lim Hock Lai ("the plaintiff") has *locus standi* to commence this action against the defendant. The plaintiff is suing the defendant for a declaration that the defendant has breached an agreement dated 13 June 1997 ("the agreement") under which the defendant undertook to build and deliver a house to the plaintiff by a certain time. Damages are also claimed.

The defendant says the plaintiff has no *locus standi* because he has by the documents called the loan agreement and deed of assignment assigned absolutely to Public Bank Berhad all his rights title and interest under the agreement. The defendant relied on *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56. Ms SY Chan, learned counsel for the Defendant, contended that the facts of the present case are the same as in Nouvau. In that case the appellant had purchased from the developer a shop office unit in a multi-storey shopping and subsequently borrowed from the Public Bank a sum $92,160.00. The appellant entered into a loan agreement with the bank and also executed an assignment of all his rights, title and interest in the property pending the issue of the strata title to the bank. Subsequently the respondent purchased from the developer the whole shopping and office complex excluding the units already sold by the developer. The appellant commenced proceedings against the respondent for certain declaratory relief. After the filing of the originating summons the assignment was revoked following the repayment and settlement of the fixed loan. A preliminary objection was taken by the respondent that the action could not be maintained in the name of the appellant as assignor. The learned judicial commissioner upheld the objection and struck out the proceedings. The appellant appealed and the Federal Court held:

> Held: (1) whether or not an agreement is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act, 1956 is to be gathered only from the four corners of the instrument itself;

(2) the document in this case was an absolute assignment not purporting to be a charge only within the meaning of s. 4(3) of the Civil Law Act and therefore the appellant was not competent to maintain the action when it was filed.

The terms of the deed of assignment that were construed were set out in the judgment in the following words:

Now, the assignment of 18 February 1978 appears to be in the form of a legal document signed by all the parties concerned, *viz*. assignor (appellant), assignee (Public Bank) and the predecessor-in-title of the respondent. After reciting that (a) the appellant had entered into a sale agreement with the respondent's predecessor-in-title for the purchase of one unit of shop/office lot in the Merlin Tower, (b) that the Public Bank would give a loan to the appellant to enable him to pay off the balance of the purchase price, (c) that when the "strata title" of the said property was issued and registered in the name of the appellant he would execute and register a first legal charge of the said property in favour of the Public Bank and (d) pending the issue of the "strata title" the appellant would assign to the Public Bank all his rights title and interest in the said property and the appellant duly executed the assignment in the following terms:

> That in consideration of the Bank having agreed to grant the loan the assignor as beneficial owner hereby assigns absolutely to the Bank all his rights title and interest in and to the said property and under the said Sale Agreement and the full benefit granted thereby and all stipulations therein contained and an remedies for enforcing the same. (See cl 1)

Clause 2 provides, *inter alia*, that the assignor shall at all times hereinafter save harmless and keep the Bank indemnified. The assignor shall be solely liable for the cost of preparing the document of assignment (see cl 3), and the assignment shall be binding upon the executors, administrators or assigns of the parties (see cl 4). In cl 5 it reads:

> This assignment shall remain in force until such time as it shall be revoked by the execution and registration thereof by the assignor of a first legal charge over the said land in favour of the Bank.

Looking at the whole document of 18 February 1978 and bearing in mind the provision of s. 6 of the Act, in our opinion, the document was an absolute assignment and not purporting to be by way of charge only within the meaning of s. 4(3) of the Civil Law Act 1956. The assignment was in terms absolute in the sense that the assignor (appellant) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all the rights title and interest in the Sale Agreement dated 1 April 1977 and the remedies of enforcing them. The instrument clearly purported and was intended in point of form, to be an absolute assignment because of the use of the word "absolutely" in cl 1 thereof [see Fry LJ in *Comfort v. Betts (supra)* at page 740].

The Federal Court had earlier ruled that you cannot take other documents into account when construing the deed of assignment, *viz.:*

> It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. With respect, we do not agree. In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

That statement of law must be read subject to the later decision of the Federal Court in *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor* [1995] 2 CLJ 11 a case I relied on in *Loh Hoon Loi & Ors v. Viewpoint Properties (Sabah) Sdn Bhd* [1995] 4 MLJ 804. The Federal Court in *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor* [1995] 2 CLJ 11 appears to have departed from the view of *Nouvau* (that you are only allowed to look at the four corners of the documents to ascertain its meaning) when it held that: "Regard must also be had to any surrounding circumstances, if any, which might legitimately be taken into consideration." Thus, I am allowed and must follow the later decision of the Federal Court of *Chooi Siew Cheong.* Therefore, I am not, contrary to what Ms SY Chan, learned counsel for the appellant, had contended, disregarding the decision of a higher court but only following another decision of the same court.

Everything that I have said in *Loh Hoon Loi & Ors* would apply aptly to this case. The documents employed in the present case in the transaction with the bank clearly show that the assignment was by way of a charge and is not an absolute assignment. Furthermore, transaction such as the one in the present case has been held by the Federal Court in *Chuah Eng Khong v. Malayan Banking Berhad* [1999] 2 CLJ 917 to be equitable mortgage or charge.

Therefore, it is impossible upon a consideration of the terms of the documents employed in the present transaction to conclude that the assignment is not by way of a charge.

If the court in *Novau* had taken the other contemporaneous documents and surrounding circumstances into account, which *Chooi Siew Cheong* says one must, the Federal Court there would not have concluded the way it did.

The appeal is dismissed with cost to the plaintiff.